Supreme Court, U.S.
FILED
FEB 2 1994
OFFICE OF THE CLERK

No. 93-723

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

X-CITEMENT VIDEO, INC.;
and RUBIN GOTTESMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STANLEY FLEISHMAN
Counsel of Record
BARRY A. FISHER
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED.

Whether the Court of Appeals correctly held that 18 U.S.C. § 2252 – which makes punishable a person who "knowingly transports or ships" or who "knowingly receives, or distributes" a visual depiction, "if" the depiction is of a minor engaging in sexually explicit conduct – violates the First Amendment because the statutory language unambiguously imposes no scienter of age requirement, and the legislative history reveals that Congress clearly and deliberately declined to impose any such scienter requirement.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Statement	1
The History of the Statute	3
Reasons for Denying the Petition	5
Conclusion	9

TABLE OF AUTHORITIES

Page

CASES

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 6

Blount v. Rizzi, 400 U.S. 410 (1971) 7

Garcia v. United States, 469 U.S. 70 (1984) 6

National Organization for Women v. Scheidler, No. 92-780 (U.S. Jan. 24, 1994) 6

New York v. Ferber, 458 U.S. 747 (1982) 4, 7

Reves v. Ernst & Young, 507 U.S. ___, 113 S. Ct. 1163 (1993) 6

Smith v. California, 361 U.S. 147 (1959) 3

United States v. Kleiner, 663 F. Supp. 43 (S.D. Fla. 1987) 4

United States v. Langford, 668 F.2d 1088 (7th Cir.), *cert. denied*, 461 U.S. 959 (1982) 4

United States v. Moore, 916 F.2d 1131 (9th Cir. 1990) 7

United States v. Thomas, 893 F.2d 1066, *cert. denied*, 498 U.S. 826 (1990) 2, 5

United States v. Tolczeki, 614 F. Supp. 1424 (N.D. Ohio 1985) 5

United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988) 4, 6, 9

STATUTES

18 U.S.C. § 2252 ..... *passim*

CONSTITUTIONS

U.S. Const. amend. I. ..... *passim*

Respondents Rubin Gottesman and X-Citement Video, Inc., respectfully submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT.

In 1986 and 1987, an undercover police officer, posing as a retailer of adult videotapes, contacted Gottesman, the operator of X-Citement Video, Inc., a wholesaler, and expressed interest in buying videotapes featuring Traci Lords. Gottesman eventually sold two sets of such tapes: the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of eight tapes that Gottesman sold to the police officer and sent (in accordance with the police officer's instructions) to Hawaii.

Ms. Lords was a popular "adult" entertainer who had appeared in mass-market magazines like Penthouse, as well as in videotapes. She was over 16 years of age when she made the tapes, which were marketed as "adult" entertainment, not as "kiddie porn." The Government never claimed that the tapes were obscene.[1]

A federal grand jury indicted respondents for distributing, shipping, and conspiring to distribute and ship child pornography in violation of 18 U.S.C. § 2252. Respondents moved to dismiss the indictment, on the grounds, inter alia, that section 2252 violates the First Amendment because it does not contain any scienter

[1] Because the Court of Appeals concluded that § 2252 is unconstitutional on its face, it did not reach respondents' argument about the statute as applied. Pet. 4a-5a.

requirement as to age, and that the indictment is constitutionally invalid because it did not allege that respondents knew the person depicted in the tapes was under 18 years of age.[2] The District Court denied the motion to dismiss, asserting that section 2252 implies a scienter requirement and that the statute and the indictment required the Government to prove that respondents knew that the person depicted in the videotapes was under 18 years of age. Pet. 40a-41a. The District Court asserted that such a requirement was constitutionally required because the distribution of books and films would undoubtedly be chilled "if sellers were burdened with learning not only the contents of all of the materials they carried, but also the ages of actors with whom they had no direct contact." Pet. 41a.

Following a bench trial, respondents were convicted; the district court sentenced Gottesman to 12 months' incarceration and X-Citement Video, Inc., to payment of a $100,000 fine. After respondents filed a notice of appeal, they requested and obtained a remand to the District Court for reconsideration of the judgment in light of *United States v. Thomas*, 893 F.2d 1066, *cert. denied*, 498 U.S. 826 (1990), which had held that section 2252 does not contain a scienter requirement as to age. On remand, the District Court adhered to its conclusion that the statute is constitutional notwithstanding the fact that it lacks a mens rea requirement. Pet. 34a.

---

[2] In light of its ruling on the constitutionality of the statute, the Court of Appeals did not address respondents' argument that the indictment was invalid. Pet. 4a n.6.

The Court of Appeals reversed, holding that section 2252 does not include a scienter requirement regarding the minority of the performers and that it therefore violates the First Amendment. The court explained that section 2252 "potentially applies to all kinds of recipients or distributors of video tapes and magazines," and "[t]o render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributors or recipients knowledge, would be to create precisely the kind of chilling affect condemned by *Smith [v. California*, 361 U.S. 147 (1959)]." Pet. 15a. Finally, the court concluded that it could not construe section 2252 so as to save its constitutionality because to do so comes too close to "judicial rewriting of a statute." Pet. 16a.

Judge Kozinski dissented in part. He agreed that the word "knowingly" in section 2252 does not apply to the age of the depicted person, Pet. 23a, and that the statute "must contain a *mens rea* requirement," Pet. 17a. He believed, however, that it was the court's duty to read a scienter requirement into the statute to render it constitutional, Pet. 27a, even if "its drafters plainly had not meant to put it there," Pet. 24a n.6.

THE HISTORY OF THE STATUTE.

In 1977 Congress enacted the Protection of Children Against Sexual Exploitation Act. On its face the word "knowingly" in section 2252 did not apply to the age of the depicted person, and the legislative history showed that Congress clearly and deliberately imposed no such

scienter requirement. *United States v. United States District Court*, 858 F.2d 534, 537, 538 (9th Cir. 1988) (*District Court*) ("This omission was quite clearly deliberate . . . . There is . . . little doubt that knowledge of the minor's age is not necessary for conviction under" the Act.).[3]

New York v. Ferber, 458 U.S. 747 (1982), moved Congress to amend the Act in 1984. Before the amendment, the Act had been construed as not requiring knowledge of the age of the person depicted. *See United States v. Langford*, 668 F.2d 1088, 1089 n.1 (7th Cir.), *cert. denied*, 461 U.S. 959 (1982). The amended Act deleted language that required that the visual depictions be transported for the purpose of sale or distribution for sale, and that the visual depiction be obscene. The amendment also raised the age limit of the person depicted from 16 to 18. The amendment, however, made no change concerning the word "knowingly."

Prior to the case at bar, the Government consistently took the position that the Act does not have a scienter element as to the minority status of the person depicted. Thus, in *United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987), the court stated that it agreed "with the government that the knowledge requirement under 18 U.S.C. § 2252 is not, as the defendants argue, whether the tape . . . was made using minors, but rather it is only the shipment or transportation of the sexually explicit material which must be knowing." *Id.* at 44. The knowledge

[3] *District Court* involved § 2251 of the Act, which deals with a person who produces the material, while § 2252 deals with a person who transports or receives the material. The legislative history applies to both sections equally.

element, the court stated, "does not concern the age of the [person]." *Id.*

In *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985), the Government again argued that knowledge of the age of the persons depicted is not an element of the offense. The court agreed, stating that a clear reading of section 2252 "indicates that Congress specifically omitted a *mens rea* requirement for conviction under the statute in order to establish a *per se* rule making it illegal for persons to knowingly transport . . . in interstate . . . commerce . . . the prohibited materials involving sexual exploitation of minors." *Id.* at 1429.

REASONS FOR DENYING THE PETITION.

1. The Court of Appeals properly held that section 2252 does not contain a scienter requirement as to age, and is therefore unconstitutional.

a. It was common ground on the court below that the word "knowingly" in the statute does not apply to the minority of the person depicted. As the court noted, " 'In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." ' " Pet. 10a (quoting *Thomas*, 893 F.2d at 1070). *See also* Pet. 23a-24a (Kozinski, J., dissenting in part) ("All *Thomas* tells us is that the word 'knowingly' in the statute does not apply to the age of the depicted children. T' s is not much more than we would learn by reading the statute ourselves.")

The Government virtually concedes this result, stating that the Ninth Circuit's reading of the Act "may be correct grammatically." Pet. 8. The Government argues, however, that the legislative history supports its argument that the word "knowingly" requires knowledge that the person depicted is under 18 years of age. Where, however, as here, "the statutory language is unambiguous," a construction at variance from that language is unwarranted at least in the absence of " 'clearly expressed legislative intent to the contrary.' " *National Org. for Women v. Scheidler*, No. 92-780 (U.S. Jan. 24, 1994) (quoting *Reves v. Ernst & Young*, 507 U.S. ___, ___, 113 S. Ct. 1163, 1169 (1993)).

Here, the legislative history, discussed at length in *District Court*, 858 F.2d at 538, is *consonant* with the statute's plain language. The history reveals that "[t]he defendant's awareness of the subject's minority is not an element of the offense." *Id.* The government's reliance on the colloquy of two senators to support its contention, Pet. 8-9, has little, if any, value. Certainly it has less value than the committee reports of both Houses of Congress, discussed in *District Court*, 858 F.2d at 538. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) ("Committee reports are 'more authoritative' than comments from the floor . . . . ").

The court below considered the possibility of reading a scienter of age requirement into the statute to save its constitutionality, but concluded that this would amount to an impermissible rewriting of the statute. Pet. 16a. *See Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("It must be remembered that although this Court will often strain to construe legislation so as to save it against

constitutional attack, it must not and will not carry this to the point of . . . judicially rewriting it. . . . "); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("It is for Congress, not this Court, to rewrite the statute.").

b. The Ninth Circuit's holding is in accord with the decisions of the Court. In *Ferber*, the Court stated that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant," 458 U.S. at 765, and added "that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial," *id.* at 773.[4]

Since the Act applies to everyone who sends or receives magazines, videotapes or other illustrated works – activities that an ordinary person would engage in innocently – the Ninth Circuit concluded that to expose so many persons to criminal exposure "if one of the performers in a portrayal of sexually explicit conduct is under age, without the distributor's or recipient's knowledge," would violate "the First Amendment as the Supreme Court has interpreted it." Pet. 15a. This is so because the age of the person depicted defines the boundary between speech that is constitutionally protected and speech that is not: absent a knowledge of age requirement, the Act imposes liability without fault. The Ninth Circuit carefully explained that the question it was deciding "does not concern the defendant's knowledge of

---

[4] The Act imposes very severe penalties and the stigma attached to a conviction is extreme. *See United States v. Moore*, 916 F.2d 1131, 1139 (9th Cir. 1990) ("Of all the crimes known to our society, perhaps none is more revolting . . . . ").

the law; it concerns his knowledge of a particular fact – the underage of the performer." Pet. 14a.

The Government virtually concedes that the Act without a scienter of age requirement would violate the First Amendment. At oral argument in the Ninth Circuit, the Government "conceded that the statute would have severe constitutional problems if it did not include a requirement of knowledge that at least one performer engaged in the specified sexually explicit acts was under 18 years of age." Pet. 13a. For that reason, it is now the Government's view that the word "knowingly" in subsections (a)(1) and (a)(2) "requires knowledge that the item transported, shipped, received or distributed, is a depiction of a minor engaging in sexually explicit conduct." Pet. 7.

Alternatively, the Government argues that, assuming the word "knowingly" does not impose a scienter as to age requirement, "it does not follow that the statute defines a strict liability offense in that regard." Pet. 9. This is so, according to the Government, because some courts have held that the Act requires proof that defendants had knowledge of the contents of the material shipped or received. Pet. 11-13. The Court of Appeals correctly characterized this argument as "a bit cagey," Pet. 9a, and "skat[ing] a very fine line," Pet. 13a, because the Government confuses knowledge of contents of a work with knowledge that a person depicted therein is under 18 years of age.

2. As the Government acknowledges, "[n]o other court of appeals has had occasion to consider whether Section 2252 is unconstitutional on the ground that it fails

to require proof that the defendant knew that the person depicted engaging in sexually explicit acts is a minor." Pet. 11 (footnote omitted).

3. There are no prudential reasons to grant certiorari in this case. Indeed, this is not a true child pornography case. The Traci Lords tapes were the subject in *District Court*, and the court there observed that "[c]ases like this one, where the actors allegedly engage in a deliberate and successful effort to deceive the entire industry, are likely to be exceedingly rare." 858 F.2d at 543. The Court should not use this unique case to address the question raised herein. If a conflict should develop between the Ninth Circuit and another court of appeals, it will then be time enough for the Court to consider the question of which the Government now seeks review.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FLEISHMAN, FISHER & MOEST
STANLEY FLEISHMAN
Counsel of Record
BARRY A. FISHER
DAVID GROSZ
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

February 2, 1994